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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

NO. 80-5658

* * *

RENE MIRELES RUIZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

* * *

ON APPEAL FROM COUNTY COURT AT LAW NUMBER 1

HIDALGO COUNTY, TEXAS

* * *

APPELLANT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Rene Mireles Ruiz, Appellant herein, respectfully asks leave of the Court to proceed in the above entitled cause in forma pauperis, pursuant to Rule 46 of the United States Supreme Court Rules, and, in support thereof, would show that:

1. Appellant requests to proceed in forma pauperis because he is indigent and without the funds necessary to pay for costs of appeal in this case.

2. Appellant has been unable to pay for any of the costs in the County Court at Law of Hidalgo County, Texas.

3. Appellant was granted leave to proceed on appeal in forma pauperis in County Court at Law Number 1 of Hidalgo County. The Statement of Facts and Transcript therein were provided without cost to Appellant. The Appellant would respectfully draw the Court's attention to his Motion for Transcript of the Record and for Permission to Proceed on Appeal in Forma Pauperis, which is set out at pages 16 through 18 in the official Court Transcript, filed together with these papers and included herein by reference for all purposes.

4. Appellant's attorney is representing him at no cost.

5. This motion is further based on the supporting affidavit of Appellant attached hereto and incorporated herein for all purposes.

WHEREFORE, Appellant respectfully prays that the Court grant him leave to proceed in this cause in forma pauperis.

Dated: November 3, 1980.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION--SOUTH TEXAS PROJECT
Box 1493
San Juan, Texas 78589
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By James C Harrington
James C. Harrington

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132 W. 43rd Street
New York, NY 10036
(212/944-9800)

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I personally delivered a true and correct copy of the foregoing Appellants' Motion for Leave to Proceed in Forma Pauperis to the Hidalgo County District Attorney, counsel for Appellee, at his office at the Hidalgo County Courthouse in Edinburg, Texas, on November 3, 1980.

James C Harrington
James C. Harrington
Attorney for Appellant

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HIDALGO COUNTY, TEXAS

* * *

STATE OF TEXAS	§	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL
COUNTY OF HIDALGO	§	IN FORMA PAUPERIS

BEFORE ME, the undersigned authority, personally appeared Rene Mireles Ruiz, who, being by me first duly sworn, did depose and state upon his oath as follows:

1. I am the Appellant in the above entitled cause; and, in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor. I state that, because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor. I believe that I am entitled to redress and that I desire to ask the Court to summarily reverse my conviction below on the grounds that it is precluded by the First Amendment to the United States Constitution.

2. I further swear that the statmements which I have made herein relating to my inability to pay the cost of prosecuting the appeal are true.

3. I am not presently employed. The date of my last full time employment was in November 1979 in Illinois. I have done some part-time work since then at the O. K. Garage in McAllen. I was unable to return to Illinois to work because of the lower court proceedings, and I lost my job there. As a result, I have been depending on my mother for food and a place to stay in McAllen. I am originally from McAllen, and my family still lives there.

4. I have not received, within the past twelve months, any income from a business, profession, or other form of self-employment, or in the form of rent payment, interest, dividends, or other source.

5. I do not have any cash, checking, or savings accounts.

6. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding my own personal clothing).

7. I understand that a false statement in this affidavit will subject me to penalties for perjury.

Rene Ruiz

Rene Mireles Ruiz
Appellant

SWORN AND SUBSCRIBED TO BEFORE ME this 3rd day of November, 1980.

Notary Public in and for
Hidalgo County, Texas

My commission expires: 4/14/84

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RENE MIRELES RUIZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

* * *

ON APPEAL FROM COUNTY COURT AT LAW NUMBER 1

HIDALGO COUNTY, TEXAS

* * *

JURISDICTIONAL STATEMENT

* * *

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Attorneys for Appellant

QUESTION PRESENTED

Whether the First Amendment allows a conviction for "abusive language" when it is undisputed that Appellant's language did not provoke his two police officer listeners and did not have a tendency to provoke them and where it was conceded that the language was not communicated in a confrontation situation.

PARTIES

There are no parties to the proceeding in County Court at Law Number 1 of Hidalgo County other than those set out in the caption of the case.

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INTRODUCTION

Rene Mireles Ruiz appeals from a final judgment of County Court at Law Number 1 of Hidalgo County, Texas, entered on August 7, 1980, finding him guilty of disorderly conduct by abusive language. §42.01(a)(1)(1974), Texas Penal Code Annotated. He submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction over this appeal and that prior decisions of this Court require summary reversal or, alternatively, plenary consideration of the substantial federal question presented.

OPINION BELOW

There is no formal opinion of the County Court at Law in this case. The record does reflect the Court's oral and written decisions on the First Amendment issue at various points throughout the trial.

JURISDICTION

A criminal complaint was presented in the Municipal Court for McAllen, Hidalgo County, Texas, on April 3, 1980, pursuant to §42.01(a)(1), charging Appellant with disorderly conduct by abusive language. He was also charged with public intoxication. He was found guilty of both charges and fined.

Appellant then "appealed" to the County Court at Law for a trial de novo. Article 45.10 (1965), Texas Code of Criminal Procedure Annotated. A jury trial was held on July 22, 23, and 24, 1980. Appellant was found not guilty of public intoxication but again convicted of abusive language.

Appellant's claim that the Texas statute as applied to him in this situation was unconstitutional under the First Amendment was properly raised and preserved throughout the trial.

Final judgment was entered on August 7, 1980, after the Court denied Appellant's Motion for New Trial, which again raised the First Amendment issue. (Statement of Facts: pp. 280 - 281). The Court, upon recommendation of the jury, imposed a fine of Fifty Dollars ($50.00), plus court costs.

The federal questions decided by the trial court were certified by that Court on October 30, 1980 (Transcript: p. 24B).

Notice of Appeal to the Supreme Court of the United States was timely filed on November 3, 1980 (Transcript: p. 24C).

No review of the substantial federal questions presented in this case is available within the Texas appellate system because the crime was classified as a "Class C" misdemeanor and the fine imposed did not exceed $100. Article 4.03(1965), Texas Code of Criminal Procedure.

Therefore, County Court at Law Number 1, even though aware of the substantial constitutional question that was presented and the lack of any interpretation of §42.01(a)(1) by the Texas Court of Criminal Appeals, was the highest available Court in Texas to determine the applied validity of §42.01(a)(1) in the face of the Appellant's substantial First Amendment challenge.

Under these circumstances, jurisdiction to review the County Court judgment herein is conferred on this Court by 28 U.S.C. §1257(2). Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); Cohen v. California, 403 U.S. 15 (1971); Powell v. Texas, 392 U.S. 514 (1968); Thompson v. Louisville, 362 U.S. 199 (1960). Cf. Brown v. Texas, 443 U.S. 47 (1979).

This Court recently exercised jurisdiction to summarily reverse a case very similar to this from County Court at Law No. 2 in Travis County, Texas. Acker v. Texas, 430 U.S. 962 (1977).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution reads, in pertinent part: "Congress shall make no law...abridging the freedom of speech...."

The Texas abusive language statute appears in §42.01(a)(1), Vernon's Annotated Texas Statutes, Penal Code, Vol. 4, p. 124:

> §42.01. DISORDERLY CONDUCT
>
> (a) A person commits an offense if he intentionally or knowingly:
>
> (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace. . . .

The jurisdiction of the Texas Court of Criminal Appeals is controlled in pertinent part by Article 4.03, which is set out in Vernon's Annotated Texas Statutes, Code of Criminal Procedure, Vol. 1, p. 371 (1965):

ARTICLE 4.03. COURT OF CRIMINAL APPEALS

> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to...the county court at law, in which the fine imposed by...the county court at law shall not exceed one hundred dollars.

STATEMENT OF THE CASE

Appellant Rene Mireles Ruiz was riding in a pick-up truck one evening with a friend, Randall Sarabia, who was driving. Two Department of Public Safety (DPS) officers stopped Sarabia for running a red light and cutting a corner through a parking lot.

One of the DPS officers, Carlos Benavides, ordered Sarabia to drive to the police department about two miles away, where he issued a traffic citation to Sarabia. Concerned and irritated that Benavides had brought them into the department rather than ticketing his friend with a citation on the street, the Appellant expressed his displeasure to Benavides.

While Sarabia was receiving the traffic citation, Appellant returned to sit in the passenger side of the pick-up. It was quite late at night, and the parking lot was virtually empty. Shortly thereafter, the two DPS officers went to leave and got in their car which was parked near the passenger side of the pick-up.

At this point, the testimony of the Appellant and the officers diverges. The Appellant claims that he simply glared at the officers. The officers claim that he, while seated in the truck, listening to music, shouted "motherfucker" loudly three times at Benavides.

It is undisputed, however, that neither officer felt provoked or urged to violence in any way. (Statement of Facts: p. 37, line 11; p. 59, lines 5 - 9; p. 77, line 24 - p. 78, line 7; p. 79, lines 8 - 14; p. 80, lines 11 - 15; p. 98, line 15 - p.

99, line 1; p. 99, lines 11 - 14).

Appellant was then charged with and convicted of public intoxication and abusive language in municipal court. On appeal to the County Court, he was acquitted of public intoxication but again convicted of the crime of abusive language.

THE QUESTION PRESENTED IS SUBSTANTIAL

Mr. Justice Harlan's introductory sentence to the First Amendment decision in Cohen v. California, 403 U.S. 15 (1971), states well the substantiality of the federal question presented in this case:

> This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

This appeal presents a constitutional question which substantially affects every State's court and law enforcement systems. It lies at the heart of police/community relations and the growing disaffection between citizens and the criminal justice system.

Every State in the Union, in some form or another, seeks to criminalize abusive language (See attached Appendix A). Most of the statutes, like Texas', provide for relatively minor penalties of fines or fines and jail time. Although some abusive language situations arise between private citizens, the vast majority are between a private citizen and a law enforcement official; and the citizen is quite likely to spend at least one night in jail and feel the immediate impact of an exercise of state "police power" before being released from custody.

The facts set out in the Jurisdictional Statement in Acker v. Texas, supra, which summarily reversed the Travis County Court in a case very similar to this one, are helpful in understanding the breadth of cases dealing with abusive language.

In Austin, Texas, alone, in 1975, there were 994 custody arrests for disorderly conduct. Thirty-five of those arrested were released; the remaining 959 persons were charged. Austin Police Department, Statistical Report - 1975, p. 5.

The Austin Municipal Courts are the most crowded courts in

Austin. Traffic cases make up the bulk of the caseload. Public intoxication is the second most frequent offense charged, and abusive language is the third. For example, in one month, between September 2 and October 6, 1976, eighty-seven cases were filed for abusive, indecent, profane, or vulgar language. Another forty-three complaints were filed for being abusive or threatening "in an obviously offensive manner" under §42.01(a)(4), a section of the Texas Penal Code which is also used to charge many speech offenses. Almost all of the 994 arrests and 959 charges for disorderly conduct by the Austin Police Department in 1975 were for some type of abusive language.

If this number of arrests and cases is extrapolated across Texas and the nation, it is reasonable to deduce that, except for traffic charges and intoxication charges, more people are brought to bar in our lower courts to answer for "speech" crimes than any other category. If a nationwide statistical source were readily available, the numbers of such cases would be shocking.

Furthermore, many courts in which such cases are tried do not appoint counsel for indigent defendants; and, indeed, the judge may not be an attorney.

All these factors intersect many times a day throughout the United States to produce a very summary form of criminal justice in these cases. Often lost is the fact that, in every abusive language case, unlike traffic and intoxication cases, there is an overriding First Amendment question.

The Texas statute is a "second generation" statute drafted to be facially valid under the Chaplinsky-Gooding line of cases.

Appellant's case demonstrates the need for this Court's continuing supervision and guidance to ensure that abusive language statutes are not applied to abridge freedom of speech, even when as narrowly drawn as can reasonably be expected of the State. If this Court does not summarily reverse, as it must under controlling precedent, it should set the ase for plenary consideration.

The federal question presented to the trial court in this case is substantial.

APPLICATION OF THE TEXAS ABUSIVE LANGUAGE STATUTE TO SPEECH WHICH DOES NOT HAVE A TENDENCY TO INCITE A LISTENER TO VIOLENCE ABRIDGES FREEDOM OF SPEECH

The question here is whether the language alleged to have been spoken in this case can be prosecuted under the Texas abusive language statute without rendering the statute as applied invalid under the First Amendment. It cannot.

This raises questions of law and fact. The Supreme Court will review a State court's findings of fact

> [w]here a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

Fiske v. Kansas, 274 U.S. 380, 385-386 (1927).

The trial jury in effect found that Appellant's words were "fighting words". That decision, essential to the finding of guilt, puts this case squarely in conflict with prior rulings of this Court on "fighting words". Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Gooding v. Wilson, 405 U.S. 518 (1972). The Appellant raised this point at the earliest and each possible opportunity, both at the opening and close of the State's case.

It is essential that "fighting words" tend to incite some immediate violence. Although, as originally stated, the doctrine applied where t ere was such a tendency or where the words did "inflict injury" */, the Court in recent years has omitted the "inflict injury" test, based, as it is, on harm to sensibilities rather than to public order. See Rutzick, Offensive Language and the Evolution of the First Amendment, 9 Harvard Civil Rights -- Civil Liberties Law Review 1, 22 (1974).

The Court in Cohen restated the Chaplinsky doctrine without any reference to personal injury or "sensibilities":

---

*/ There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include...the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace [footnotes omitted].

Chaplinsky v. New Hampshire, 315 U.S. at 571 - 572.

> This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.

Cohen v. California, 403 U.S. at 20.

Shortly thereafter, this Court decided Gooding v. Wilson, which more explicitly rejected the "sensibilities" doctrine. In holding that Georgia had punished a broader category of language than the First Amendment would permit, Justice Brennan's opinion for the Court observed:

> Plainly, although "conveying . . . disgrace" or "harsh insulting language," these were not words "which by their very utterance . . . tend to incite an immediate breach of the peace."

Gooding v. Wilson, 405 U.S. at 526.

The First Amendment guarantees permit punishment only of "fighting words", words which "...have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." Gooding v. Wilson, 405 U.S. at 524. Cf. also Chaplinsky v. New Hampshire, 315 U.S. at 573.

In adopting that narrow definition, this Court specifically rejected the common experience test which allowed the jury to set its own standards and convict for language it found unacceptable or offensive regardless of its actual effect. Gooding, 405 U.S. at 527. The Court found that such a test was overly broad and constitutionally infirm because it failed to properly limit the jury to finding a breach only where "fighting words" were used and because it allowed punishment for use of protected speech.

Under Gooding, the jury must find that fighting words were actually used. 405 US at 528. This narrow test was designed precisely to prevent the type of conviction presently before the Court whereby a breach is found notwithstanding the lack of any "fighting words".

Numerous other cases clearly indicate that punishment for abusive speech requires a tendency to incite immediate violence, and not merely harm to sensibilities. Rosenfeld v. New Jersey, 408 U.S. 901 (1972)(per curiam); Brown v. Oklahoma, 408 U.S. 914 (1972); Cason v. City of Columbus, 409 U.S. 1053 (1972) (per

curiam); Papish v. Board of Curators, 410 U.S. 667 (1973); Hess v. Indiana, 414 U.S. 105 (1973); Lucas v. Arkansas, 494 S.W.2d 705 (Ark. 1974) rev'd and remanded, 416 U.S. 919 (1974), appeal dismissed 423 U.S. 807 (1975).

Nevertheless, despite such clear authority, the County Court wrongly refused to advise and instruct the jury that it could only find Appellant guilty if it found he had used language which tended to incite an immediate breach of the peace "by the person to whom the language was addressed" [Transcript: Defendant's first proposed Charge of the Court, p. 9; and Defendant's Proposed Second Charge of the Court (Paragraphs I and VII), p. 10].

Further, the County Court erroneously used an expansive and unconstitutional definition of "breach of the peace", despite the Appellant's objections. [Transcript: Defendant's Proposed Second Charge of the Court (Paragraph V), p. 10; and Objections to the Charge, p. 11]. The County Court instructed the jury:

> The term "Breach of the Peace" is defined as: All violations of public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community; a disturbance of the public tranquility by any act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of public order by an act likely to produce violence, or which by causing consternation, alarms and disturbs the peace and quiet of the community.

However, Gooding rejected broad definitions of "breach of the peace" wherein breach includes

> "...all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community....By 'peace; as used in this connection, is meant the tranquility enjoyed by the citizens of a municipality or a community where good order reigns among its members."

405 U.S. at 527.

The definition used by the County Court below is almost verbatim to that specifically faulted in Gooding, and it is just as defective.

First Amendment freedoms would be sharply eroded if the mere use of unacceptable or offensive language were punishable. There is no constitutionally sound basis for punishing some language or words per se:

> For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.

Cohen v. California, 403 U.S. at 25.

Cohen, Gooding, and their progeny in this Court demonstrate that Appellant's language was protected as a matter of law. Yet, even if the matter were looked at as one of fact, rather than a question of law (as Gooding suggested), there was no evidence in the trial of this case to indicate that there was even the remotest possibility of a breach of the peace.

Both parties remained seated in their respective automobiles during the entire episode (Statement of Facts: p. 99, line 15 - p. 100, line 20; p. 142, lines 7 - 11).

The complaining witness, Carlos Benavides, testified that the language did not "upset" him and that he did not feel provoked in any way (Statement of Facts: p. 37, line 11; p.59, lines 5 - 9). The other officer with Benavides at the time and to whom the language was not addressed was merely "offended", but not provoked by the language (Statement of Facts: p. 89, line 16). In fact, that officer was not exactly sure what disorderly conduct by abusive language was (Statement of Facts: p. 106, lines 16 - 21). Finally, one of the State's witnesses affirmed that, when he saw Appellant right after the incident, Appellant was "cooperative" (Statement of Facts: p. 253, lines 3 - 6). The word allegedly uttered was admittedly not a fighting word. It may be distasteful, but such language cannot be punished consistently with First Amendment guarantees of free speech.

Nevertheless, notwithstanding the fact that the word at issue did not tend to cause any breach of the peace, the trial judge and jury did what many trial judges and juries do daily when faced with similar abusive language cases: the County Court allowed the jury to apply a "sensibilities" doctrine, finding the word a "fighting word" if it tended to injure Officer Benavides'

The decisions of this Court make it plain that the conviction here violated the First Amendment. It is clear that State cannot criminalize particular words, specifically the word "fuck". Cohen v. California, 403 U.S. at 26. The word does not, as a matter of law, incite a breach of the peace; and its impact on the sensibilities of hearers is constitutionally irrelevant.

In Gooding, the Court held that Georgia could not punish "God damn you, why don't you get out of the road". 405 U.S. at 525. Just as that phrase could not, as a matter of law, be found "fighting words", so too with the word "motherfucker" allegedly spoken by Appellant.

The facts in this case are strikingly similar to those that resulted in this Court's summary reversal or vacation of convictions under numerous State abusive language statutes. In Acker v. Texas, Acker drove up alongside the complaining witness' car which had been involved in a minor traffic incident and stated, probably more than once, "Get your fucking car out of the way. You're blocking traffic." (Acker Jurisdictional Statement, Appendix A, pp. 13, 28). See also Lewis v. New Orleans, 415 U.S. 130 (1974) (striking down statute permitting punishment for addressing police officer as "god damn mother fucking police");

---

*/ It is important to note that Appellant was not arrested for public intoxication until Benavides heard the language and determined that he was "a danger to himself or others" because of that language (Statement of Facts: pp. 68 - 69). One of the elements of the Texas law on public intoxication requires a prior-arrest determination that the person is a danger to self or another. Article 42.08, Texas Penal Code Annotated. Thus, the jury's decision that Appellant was not publicly intoxicated shows that the jury must not have believed that Appellant's language was really "dangerous"; and, if it was not dangerous, it looks even more like the jury applied a "sensibilities" test, rather than the "fighting words" test.

Lucas v. Arkansas, supra, (vacating conviction for saying "big, bad mother fucking cops" and "chicken shit mother fucker" to officers); Rosenfeld v. New Jersey, supra (vacating conviction for uttering "motherfucker"), indictment dismissed, 303 A.2d 889 (1973); Brown v. Oklahoma, 408 U.S. 914 (1972) (vacating conviction for uttering "motherfucker facist pig cops"), indictment dismissed, 503 P.2d 571 (Okla. Ct. Crim. App. 1971). These cases plainly require summary reversal here.

The word "motherfucker" in this case was similarly "emotive", as in the cases above, to emphasize the Appellant's evident displeasure with the officers' having taken his friend to the police station merely to give him a traffic ticket. It had no tendency to incite immediate violence, especially if uttered under these understandably annoying circumstances by a wholly innocent third party who finds himself detained outside a police station while waiting for a friend.

In short, this Court's consistent First Amendment jurisprudence clearly requires summary reversal. Alternatively, this Court should call for briefs and oral arguments in order to build an analytical model for application to such abusive language situations. The impact of arguably valid statutes being applied on the streets and in our courts in an obviously overbroad manner can only serve to increase the daily strain on an already over burdened police/community relations. It is exactly this type of citizen disaffection in one sensitive area that generates general disgust and lack of faith in the criminal justice system.

CONCLUSION

For the foregoing reasons, the question presented by this appeal is substantial and of great public importance. Appellant respectfully urges that probable jurisdiction should be noted and the case summarily reversed. Alternatively, the Court should set this case for plenary consideration.

Dated: November 4, 1980.

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I personally delivered a true and correct copy of the foregoing Jurisdictional Statement to the Hidalgo County District Attorney for Hidalgo County, counsel for Appellee, at his office at the Hidalgo County Courthouse in Edinburg, Texas, on November 4, 1980.

James C Harrington
James C. Harrington
Attorney for Appellant

APPENDIX A

LIST OF ABUSIVE LANGUAGE STATUTES BY STATE

ALA. CODE, §13-6-100 (1975)

ALASKA STAT., §11.45.030(3) (1975)

ARIZ. REV. STAT. ANN., §13-2904 (1978)

ARK. STAT. ANN., §1-2908 (1975)

CAL. PENAL CODE, §415(3) (1976)

COLO. REV. STAT. REV., §18-9-106(a) (1973)

CONN. GEN. STAT. REV., §53a-181(5) (1972)

DEL. CODE ANN., §1301(1)(b) (1974)

D.C. CODE ENCYCL. ANN., §22-1121(1) (1967)

FLA. STAT. ANN., §877.03 (1976)

GA. CODE ANN., §26-2610 (1972)

HAWAII REV. STAT., §38-772-2(1) (1968)

IDAHO CODE, §18-6409 (1975)

ILL. ANN. STAT., §26-1(a)(1) (1976)

IND. ANN. STAT., §10-1510 35-45-1-3(1) (1976)

IOWA CODE ANN., §723.4(3) (1976)

KAN. STAT. ANN., §21-4101(c) (1974)

KY. REV. STAT. ANN., §525-070(1)(b) (1979)

LA. REV. STAT. ANN., §14:103(A)(1) (1979)

ME. REV. STAT. ANN., Title 17A, §501(B)(2) (1976)

MD. ANN. CODE, Article 27 §121 (1976)

MASS. GEN. LAWS ANN., Chapter 272, §53 (1976)

MICH. STAT. ANN., §28.569 (1972)

MINN. STAT. ANN., §609-72(3) (1976)

MISS. CODE ANN., §547.010(1)(b) and (2)(b) (1979)

MO. ANN. STAT., §562.240 (1949)

MONT. REV. CODE ANN., §94-8-101(c) (1973)

NEV. REV. STAT., §16.203.010 (1973)

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N.J. REV. STAT. ANN., §2C:33 - 2(b) (1978)

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N.Y. PENAL LAW, §240.20(3) (1975)

N. C. GEN. STAT., §14-197 (1975)

N.D. CENT. CODE, §12.1-31-01(3) (1975)

OHIO REV. CODE ANN. §2917.11(A)(2) (1975)

OKLA. STAT. ANN., Title 21, §1362 (1975)

ORE. REV. STAT., §166.025(c) (1979)

PA. STAT. ANN., Title 18, §5503(a) (1973)

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TENN. CODE ANN., §39-1213 (1975)

TEX. PENAL CODE, Article 42.01(a)(1) and (4)

UTAH CODE ANN., §76-9-102(1)(b)(18)(1978)

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VA. CODE ANN., §18.1-416 (1975)

WASH. REV. CODE ANN., §9A.84.030(1)(a) (1976)

W.VA. CODE ANN., §61-8-15 (1976)

WIS. STAT. ANN., §947.01(1) (1979)

WYO. STAT. ANN., §6-6-201 (1977)

NO. 80-5658

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RENE MIRELES RUIZ,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The County Court At Law No. 1
Hidalgo County, Texas

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

I. Whether the First Amendment allows a conviction for "abusive language" when the vilifying language viewed in conjunction with the aggressive and threatening conduct that accompanied the language, reasonably caused the police officers to whom such language and conduct were directed to conclude that the language "by its very utterance tended to incite an immediate breach of the peace."

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APPELLEE'S MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Appellee herein, and, by and through its Attorney General, Mark White, files this its Motion to Dismiss or Affirm.

OPINION BELOW

Appellant correctly states that there is no written opinion of County Court at Law No. 1, Hidalgo County, Texas, in the case. That court overruled all of Appellant's various First Amendment objections at trial.

JURISDICTIONAL STATEMENT

Although Appellant does not challenge the constitutionality of the Texas statute under which he was convicted, he

does assert that the statute was unconstitutionally applied to him. For that reason, the Court may have jurisdiction of this appeal under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Appellant relies upon Tex. Const. amend. I, Tex. Penal Code §42.01(a)(1), and Tex. Code Crim. Proc. Ann. art. 4.03.

STATEMENT OF THE CASE

During the evening of April 2, 1980, Officer Carlos Benavides and Officer Richard Madden of the Texas Department of Public Safety observed a pickup truck travelling at a high rate of speed on South 10th Street in McAllen, Texas. (S/F 20). The officers followed the pickup. They observed the pickup run a red light and put on their overhead lights to attempt to pull the vehicle over. (S/F 21). The driver, however, did not stop, and attempted to avoid a second intersection by cutting across a shopping center parking lot. (Id.). The driver then pulled into the parking lot of a Church's Fried Chicken. The police, at this point, were immediately behind the pickup and the driver stopped. (Id.).

Mr. Sarabia, the driver of the pickup, stepped out to talk with Officer Benavides. Appellant, who was a passenger in the pickup, got out and "just kind of stood between" Officer Benavides and Mr. Sarabia. (S/F 22). Officer Benavides smelled alcohol on the breath of both suspects. (S/F 24, 68). Even though Officer Benavides requested that Appellaht step to one side so he could talk to Mr. Sarabia, Appellant refused. (S/F 22). Officer Benavides requested that Mr. Sarabia follow him to the McAllen Police Station. Appellant again interjected himself into the matter and told the officer, incorrectly, that he had no right to take them in. (S/F 24).

Since Mr. Sarabia knew the way to the police station, Officer Benavides decided to follow the pickup. On the way to the station, Appellant "just stood out of his car, about half of his body, and said something" to some passing cars full of girls. (S/F 25). This behavior is indicative of Appellant's attitude toward the policemen following just behind the pickup.

On arriving at the parking lot of the police station, and while still outside, Officer Benavides again attempted to explain to Mr. Sarabia why he had taken him to the station. Appellant again interjected himself ino the conversation and told Officer Benavides that he had no right to bring them in and that Officer Benavides could have just given them a traffic citation and let them go. (S/F 29). Apparently Appellant had become more agitated at this point in the evening. (Id.).

The police officers, Mr. Sarabia, and Appellant all entered the police station. At the front desk, Officer Benavides explained to the desk officer why he had brought Mr. Sarabia into the station. Again, for the third time, Appellant interjected himself into the matter. His attitude at this point toward the officers had further deteriorated. (S/F 29). Officer Benavides then turned to explain to Mr. Sarabia what he needed to do to clear up the traffic citations. For the fourth time that night, Appellant attempted to involve himself in the discussion, and at this point Mr. Sarabia asked him to shut-up and go sit in the pickup. (S/F 31, 163). Finally Appellant went out to the pickup.

After Mr. Sarabia posted bond, Officers Benavides and Madden exited from the station. As they walked to their police car, they heard loud music coming from Mr. Sarabia's pickup. Just as they were getting into their car, which was

parked near the pickup, they heard Appellant, over the music, say "mother fucker." He then repeated "mother fucker" in a louder voice. Next he repeated "mother fucker" again in a louder voice, and in the words of Officer Benavides, he "threw us the finger." (S/F 33). For this conduct, Appellant was eventually convicted for one type of disorderly conduct: language "that by its very utterance tends to incite an immediate breach of the peace." This appeal followed.

MOTION TO AFFIRM

The application of the Texas abusive language statute in the context and circumstances of this case did not abridge Appellant's First Amendment rights. In the context of the high level of frustration caused by Appellant's conduct and actions, and the adversarial role Appellant had assumed since his initial contact with the policemen and that he had pursued throughout the evening, his vile words in the police station parking lot constituted "fighting words" and were not subject to First Amendment protection.

Appellant's words not only "tended" to incite a breach of the peace, but there is some indication, contrary to Appellant's statements in his brief, that his words actually caused a breach of the peace. Appellant correctly points out that Officer Benavides testified that the words did not offend him and that he would not have hit Appellant. At least one witness, however, testified that the use of some force was necessary to arrest Appellant, subdue him, and take him to the front desk at the police station. (S/F 138, 139). Appellant apparently received some medical treatment the next day. (S/F 177). Further, Officer Madden testified that he was offended by Appellant's words. (S/F 89). The fact that Appellant had taken on an adversarial role which continued over a substantial period distinguishes this case from those he cites.

Several other factors should also be noted. The use of the word "motherfucker" might be more likely to incite the police or citizens to breach the peace in Hidalgo County, Texas, than, for example, in a New York City ghetto. In Hidalgo County, a highly Mexican-American and Catholic area, "motherfucker" is one of the viler, if not the most defamatory, epithet. Second, Appellant made these statements in a public place in which the potential audience was limited only by the loudness with which he could scream the words. Not only could people in the parking lot hear Appellant, but people passing by on the street or in the apartment across the street were also potential witnesses to the scene in the parking lot. The police should not be forced to wait until a citizen who sees these events actually initiates violence. The State has a valid interest in arresting a person that makes statements tending to cause a breach of the peace, before a breach actually occurs.

Even if it were true that on this particular night, no one other than the police, had seen Appellant verbally assail two police officers, the question before this Court is whether the State has the right to regulate speech which has the potential to cause harm. The potential that there could have been witnesses incited by what they saw Appellant say and do, given the fact that the incident occurred in a public place, was more than just a mere possibility. Appellant could not be certain that his words and actions would not be seen and heard by anyone within earshot. Considering all the circumstances surrounding Appellant's statement, the context in which he made it, the Texas abusive language statute, Tex. Penal Code §42.01, was not unconstitutionally applied.

On its facts, this case resembles Chaplinsky v. New Hampshire, 315 U.S. 668 (1942). There the Court affirmed the conviction of a defendant for saying to a police officer in public, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists". The Court said:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are cerain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterance are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-572.

Like the New Hampshire statute, the Texas statute is narrowly drawn with the relevant Supreme Court cases in mind so that it only proscribes language not protected by the First Amendment. In Jimmerson v. State, 561 S.W.2d 5 (Tex.Crim.App. 1978), the Texas Court of Criminal Appeals heard a defendant challenge, on the basis of Gooding v. Wilson, 405 U.S. 518 (1972), the constitutionality of another portion of the statute in question, § 42.01(a)(4). Although the Court of Criminal Appeals ultimately found it unnecessary to determine the question, it asked rhetorically whether § 42.01(a)(4) applies "only to 'fighting words' which by their very utterance tend to incite an immediate breach of the peace." The court then answered its question:

> ... we are confident that the Legislature intended that anything short of 'fighting words' would not be a violation of that section because the section was enacted and became effective (January 1, 1974) well after the decision in Gooding v. Wilson and Chaplinsky v. New Hampshire, both supra, had clarified the law on the subject of disorderly conduct statutes...

561 S.W.2d at 7.

This Court did not declare the Texas statute void on its face in Acker v. Texas, 430 U.S. 962 (1977). The statute has been narrowly drafted by the legislature and narrowly construed by the Texas courts. On the facts of the case at bar, the statute was properly applied. The judgment should be affirmed.

MOTION TO DISMISS

This case fails to present a substantial federal question and should be dismissed for that reason.

First, as explained above, no challenge to the facial validity of the statute, Tex. Penal Code § 41.01(a)(2) is raised. Appellant challenges only the application of the statute to his words and conduct under the circumstances described. This isolated case is not of sufficient importance to be of concern to the Court. Contrary to Appellant's assertion, a similar set of circumstances is not likely to recur in the future. In fact, Officer Madden, one of the arresting officers in this case, testified as follows with respect to Appellant's abusive language:

> "I was offended [by the action of Appellant] and I couldn't believe it. You know in four and a half years that has never happened before. Most people don't act in that manner, whenever we make an arrest or traffic contact, or whatever."

(S/F 89).

Appellant also complains of a defective jury instruction. The parties are agreed that the statute under which Appellant was convicted is facially constitutional. The parties, therefore, are in agreement that a proper jury instruction is one that would require the jury, in order to return a valid verdict of guilt, to find that the accused has committed all the elements of the offense with which he is charged. Self-evidently, if the trial court erred in its jury instructions, that is a matter to be corrected by writ of habeas corpus, and not one that requires this Court's attention.

Finally, Appellant points to a host of authorities from this Court delineating the parameters of words and conduct that may constitutionally support a conviction for disorderly conduct or abusive language. E.g., Lucas v. Arkansas, 416 U.S. 919 (1974); Lewis v. New Orleans, 415 U.S. 130 (1947); Brown v. Oklahoma, 408 U.S. 914 (1972); and Rosenfeld v. New Jersey, 408 U.S. 901 (1972). It is the very existence of these authorities, and the wealth of guidance for the States that they contain, that render this case unworthy of the Court's attention. Appellant has failed to present any substantial federal question, and his appeal should be dismissed for that reason.

CONCLUSION

For these reasons, Appellee respectfully prays that the appeal be dismissed or affirmed.

Respectfully submitted,

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OCTOBER TERM, 1980

RENE MIRELES RUIZ,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The County Court At Law No. 1
Hidalgo County, Texas

PROOF OF SERVICE

I hereby certify that on the 5th day of January, 1981, three copies of the Appellee's Motion to Dismiss or Affirm were mailed, postage prepaid, to Mr. James C. Harrington, American Civil Liberties Union Foundation-South Texas Project, Box 1493, San Juan, Texas 78589. All parties required to be served have been served. I am a member of the Bar of this Court.

Douglas M. Becker

DOUGLAS M. BECKER
Assistant Attorney General
Austin, Texas

ATTORNEY FOR APPELLEE

SUBSCRIBED AND SWORN TO before me this 5th day of January, 1981.

Mary Jane Lide Kellogg

NOTARY PUBLIC in and for
Travis County, T E X A S

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IN THE

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OCTOBER TERM, 1980

* * *

NO. 80-5658

* * *

RENE MIRELES RUIZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

* * *

ON APPEAL FROM COUNTY COURT AT LAW NUMBER 1

HIDALGO COUNTY, TEXAS

* * *

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

* * *

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INTRODUCTION

The Appellant, Rene Mireles Ruiz, respectfully files this Brief Opposing Appellee's Motion to Dismiss or Affirm.

Because Appellant believes that the Statement of the Case in Appellee's Motion incorrectly cited some facts or took them out of context, Appellant submits this brief to show that, under the facts cited by Appellee and the other facts in this case, the Texas statute prohibiting abusive language was unconstitutionally applied against Appellant.

Generally, Appellee's Motion strengthens Appellant's claim of the absence in this case of an essential element of the crime of abusive language under the Texas Penal Code §42.01(a)(1), namely, that the words allegedly used by Appellant were "fighting words" which tended to incite an immediate breach of the peace by the person to whom the words were addressed.

STATEMENT OF THE CASE

Appellant respectfully submits that this statement of the facts shows the circumstances and context in which the criminal charge arose for which Appellant was convicted.

Appellant Rene Mireles Ruiz was riding in a pick-up truck one evening with a friend, Randall Sarabia, who was driving. Two Texas Department of Public Safety (DPS) officers stopped Sarabia for running a red light and cutting a corner through a parking lot.

Apparently, the driver did not know the DPS officers were following him until he stopped at a fried chicken restaurant. (Statement of Facts: p. 21, lines 17 - 25; p. 48, lines 3 - 22).

While DPS Officer Carlos Benavides was questioning the driver Sarabia, Appellant did not impede the questioning (Statement of Facts: p. 23, line 21 - p. 24, line 13).

Benavides then ordered the driver to proceed to the McAllen police department about two miles away, where he gave him a traffic citation. Appellant expressed his displeasure to Benavides that he had brought them over to the department rather than ticketing his friend with a citation on the street.

In the McAllen police station, Appellant again expressed his displeasure at the situation, but not in language criticized by the officers. A McAllen police officer asked Appellant to quiet down, and he did so. (Statement of Facts: p. 120, line 6 - p. 121, line 2).

While the driver was receiving the citation, Appellant returned to sit on the passenger side of the pick-up. It was quite late at night, and the parking lot was virtually empty. Shortly thereafter, the two DPS officers went to leave and got in their car which was parked near the passenger side of the pick-up.

At this point, the testimony of Appellant and the officers diverges. Appellant claims that he simply glared at the officers. The officers claim that he, while seated in the truck, listening to music, shouted "motherfucker" loudly three times at Benavides.

It is undisputed, however, that neither officer felt provoked or urged to violence in any way (Statement of Facts: p. 37, line 11; p. 59, lines 5 - 9; p. 77, line 24 - p. 78, line 7; p. 79, lines 8 - 14; p. 80, lines 11 - 15; p. 98, line 15 - p. 99, line 1; p. 99, lines 11 - 14). In fact, Benavides said he was not even offended (Statement of Facts: p. 77, line 24 - p. 78, line 7).

It is also undisputed that the words, if any, were directed to Benavides and not to the public at large. The parking lot was

nearly vacant, and Appellant did not go out to the street and hollar. (Statement of Facts: p. 77, lines 6 -23; p. 83, line 1 - p. 85, line 4; p. 108, line 4 - p. 110, line 19).

Further, one of the DPS officers said that, at that time when the Appellant was in the truck, he was the least physically aggressive that he had been that evening (Statement of Facts: p. 117, line 16 - p. 118, line 1).

The interesting question raised by Appellee's motion is the officers' use of force. Both officers claim they did not use excessive force against Appellant. However, Appellee's motion cites the testimony of Arnoldo Ramirez, a bystander who happened to be in the police station at the time, who said that the officers used very excessive force on Appellant, who himself was not using force. (Statement of Facts: p. 42, lines 7 - 8; p. 275, line 24 - p. 276, line 13; p. 138, line 6 - p. 139, line 15).

Appellant was then charged with and convicted of public intoxication and abusive language in municipal court. On appeal to the County Court, he was acquitted of public intoxication but again convicted of the crime of abusive language.

From the County Court conviction, Appellant has made this appeal.

APPLICATION OF THE TEXAS ABUSIVE LANGUAGE STATUTE TO SPEECH WHICH DOES NOT HAVE A TENDENCY TO INCITE A LISTENER TO VIOLENCE ABRIDGES FREEDOM OF SPEECH

Appellant was arrested for allegedly having called Officer Benavides a "motherfucker" three consecutive times. The record is clear that, for the hour or so that Appellant was with the officers, it was only at the end of the encounter, after he was sitting on the passenger side of the pick-up truck, when he allegedly used the words which the officers claim. (Statement of Facts: p. 117, line 16 - p. 118, line 1).

Up until that time, the officers did not claim that he used any other abusive language whatever; and they did not claim that he physically interfered with them. They simply did not like that he persistently objected to their making his friend drive to the police station only for a traffic ticket. Appellant insisted

that they should have given the ticket to his friend out on the street.

Only at the end of the incident is he alleged to have used the language, at the time when one of the officers affirmed that he was least aggressive.

What happened in this case, as one of the officers said in the trial, is that Appellant was really arrested for his "attitude" rather than for language which tended to provoke an immediate breach of the peace. "It was a combination of things. It was not one incident at that point. It was a general deterioration in his attitude" (Statement of the Facts: p. 102, lines 21 - 23; p. 101, line 20; p. 104, line 10). As Benavides said, "...from the very beginning I think he had an attitude towards me" (Statement of Facts: p. 76, lines 17 - 18).

The same point is conceded in the Appellee's Motion: "This behavior [which admittedly was not illegal] is indicative of Appellant's attitude toward the policemen following just behind the pickup" (Appellee's Motion, p. 3). "The fact that Appellant had taken on an adversarial role which continued over a substantial period of time distinguishes this case from those he cites". (Appellee's Brief, p. 4). The fact that the Appellant assumed an adversarial role and questioned the officers' actions does not mean that he was guilty of a crime.

Even Appellee's Motion (p. 4) clearly admits that Benavides was neither offended nor provoked to violence by what Appellant allegedly said. The State attempts to say that Appellant's language tended to provoke a breach of the peace because of a "potential audience", "potential witnesses", or "potential to cause harm" (Appellee's Brief, p. 5). It is exactly such a vague application of the Texas statute which the cases prohibit. Such is not the test in determining whether the language used tended to provoke an immediate breach of the peace by the person to whom it was addressed. There simply was no audience or witnesses, only the Appellant and two officers.

Appellee's speculation about the highly Mexican-American and Catholic area of Hidalgo County is conjecture at its best and wholly unsupported by the record. It also shows a lack of familiarity with the Spanish language and its more common, daily expressions.

Certainly, the language that Appellant is alleged to have used in this case is not language that is criminal under the vast authority of this Court.

CONCLUSION

Therefore, Appellant respectfully urges that probable jurisdiction be noted and the case summarily reversed. Alternatively, the Court should set this case for plenary consideration and deny Appellee's Motion in its totality.

Dated: January 23, 1981.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this 23rd day of January, 1981, three copies of the Appellant's Brief Opposing Appellee's Motion to Dismiss or Affirm were mailed, postage prepaid, to Douglas M. Becker, Assistant Texas Attorney General, attorney for Appellee, at Box 12548, Austin, Texas 78711. All parties required to be served have been served. I am a member of the Bar of this Court.

James C Harrington
James C. Harrington
Attorney in Charge for Appellant